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No. 92-674

In The
Supreme Court of the United States
October Term, 1992

EDGAR H. W. LUM,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Ronald B. Mun
Counsel of Record
Corporation Counsel
Rodney Veary
Michael N. Tanoue
Deputies Corporation Counsel
City and County of Honolulu
Honolulu Hale
530 South King Street
Honolulu, Hawaii 96813
(808) 523-4628
Counsel for Respondent
City and County of Honolulu

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QUESTIONS PRESENTED

1. Whether Petitioner's claims (a) that he was fired in retaliation for filing a Title VII claim and should therefore be reinstated to his job, (b) that he should be reinstated to his job for violation of his due process rights, and (c) that he was not given a fair trial, should be denied review by this Court since Petitioner failed to raise such issues at the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit")?

2. Whether there was substantial evidence to support the district court's findings of fact regarding Petitioner's Title VII claim?

3. Whether Petitioner's claim that he should be reinstated to his job under section 76-46 of the Hawaii Revised Statutes should be denied review by this Court since such a claim involves interpretation of a state statute, a task more appropriately left to the lower federal courts?

4. Whether the Ninth Circuit correctly ruled that Petitioner is not entitled to relief under section 76-46 of the Hawaii Revised Statutes because both a state arbitrator and the district court found that Petitioner had been terminated for good cause and the result would not have been different even if he had received pretermination notice and a hearing?[1]

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[1] Should certiorari be granted, Respondent City and County of Honolulu may pose an additional question for review by this Court:

5. Whether, before reaching the merits of Petitioner's claim for relief under section 76-46 of the Hawaii Revised Statutes, the question of the interpretation of such state statute should be certified to the Hawaii Supreme Court in accordance with Rule 13 of the Hawaii Rules of Appellate Procedure?

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EDGAR H. W. LUM,

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CITY AND COUNTY OF HONOLULU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City and County of Honolulu (hereinafter "the City") prays that the petition for review of the judgment of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), filed and entered on June 15, 1992, be denied.

OPINIONS BELOW

The following opinions were rendered by the lower courts in this matter:

Lum v. City & County of Honolulu, 690 F. Supp. 914 (D. Haw. 1988) (holding that a state arbitration award, confirmed by a state court, would not have preclusive effect in a federal Title VII action, but that the arbitrator's findings should be given some weight at trial).

Lum v. City & County of Honolulu, 728 F. Supp. 1452 (D. Haw. 1989) (denying the City's motion for reconsideration of an order denying motion for summary judgment, and distinguishing *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, 493 U.S. 817 (1989)).

Lum v. City & County of Honolulu, 732 F. Supp. 1070 (D. Haw. 1990) (dismissing as moot Plaintiff Edgar H.W. Lum's motion for reconsideration of an order granting the City's motion to amend an interlocutory order to include a statement for interlocutory appeal).

Lum v. City & County of Honolulu, 963 F.2d 1167 (9th Cir. 1992) (dismissing in part, affirming in part, and vacating in part the judgment entered by the United States District Court for the District of Hawaii).

JURISDICTION

The Ninth Circuit issued its original decision on March 17, 1992. On or about March 30, 1992, Petitioner filed a petition for rehearing en banc, and, on or about May 26, 1992, he filed an addendum to his petition. On June 15, 1992, the Ninth Circuit filed and entered an amended opinion, which is the subject of this petition for writ of certiorari. *See* Appendix "A."

On or about July 31, 1992, Petitioner filed a tardy second petition for rehearing en banc, and, on or about August 12, 1992, he filed an ex-parte motion to recall the mandate. The Ninth Circuit, on August 31, 1992, denied the motion to recall the mandate and ordered the clerk of the court to "accept no further filings from Mr. Lum regarding this matter." Despite the Ninth Circuit's admonition, on or about September 1, 1992, Petitioner

attempted to file a third petition for rehearing en banc. The City has no knowledge of whether the Ninth Circuit accepted this document for filing.

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the Ninth Circuit was conferred by 28 U.S.C. § 1291. The federal district court had federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 2000e-3, and pendent jurisdiction over the state-law claims.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions bearing on Petitioner's due process claim are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment, in relevant part, provides that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The statute governing Petitioner's Title VII claim reads in part as follows:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because

> he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

The statute involved in Petitioner's pendent state-law claim reads as follows:

> **Dismissals; demotions.** An appointing authority may dismiss or demote any employee when the appointing authority considers that the good of the service will be served thereby. Dismissals may be made only for such causes as will promote the efficiency of government service.
>
> No dismissal or demotion of a regular employee shall be effective for any purpose unless at least ten days before the effective date thereof the appointing authority shall have given to the employee a written statement setting forth the specific reasons upon which the dismissal or demotion is based.

Haw. Rev. Stat. § 76-46. The corresponding City and County of Honolulu Civil Service Rule states that:

> [W]hen an employee is dismissed or demoted, a written notice setting forth the specific reasons for the dismissal or demotion shall be given the employee at least ten

> calendar days before the effective date of such dismissal or demotion and a copy thereof shall be filed with the Director.

Civ. Service R. 10.3(c).

STATEMENT OF THE CASE

A. Background Facts

Petitioner, a person of Chinese ancestry and a certified public accountant, was employed by the City as an Internal Control Analyst II from March 9, 1967 to July 28, 1979. Petitioner's Appendix (P.A.) at 4a.[2] During his employment with the City, Petitioner was a member of the Hawaii Government Employees Association, Unit 13, and was covered by a collective bargaining agreement entered into between the union and the City. P.A. at 4a-5a.

Between November 1972 and July 1979, Petitioner's work history was replete with instances of poor and insubordinate work performance. In late 1972, supervisor Arlie Carson found Petitioner's report on an equipment inventory project to be "incomplete" and "lack[ing] in depth and detail." P.A. at 5a. In early 1973, E.T. Hara drafted a memorandum requesting that "corrective action" be taken against Petitioner because of his

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[2] All of the background facts contained in this "Statement of the Case" are derived from the "Decision, Findings of Fact, and Conclusions of Law," rendered by the United States District Court for the District of Hawaii on August 29, 1990. A copy of this document is attached as Appendix "A" of Petitioner's brief.

It should be noted that Petitioner failed to challenge any of these factual findings in the Ninth Circuit, so they should be viewed as conclusive.

"ineptitude and general ineffectiveness" in work performance. *Id.* Less than a month later, Mr. Carson issued a written reprimand to Petitioner, which followed an earlier verbal reprimand, warning that "the next violation of Civil Service Rules could result in suspension or dismissal from employment with the City and County of Honolulu." P.A. at 5a-6a.

During 1975 and 1976, Mr. Carson attempted to relocate Petitioner to another City department because he felt that a different environment might improve Petitioner's attitude towards his work. P.A. at 10a-11a. However, the Department of Transportation and the Honolulu Police Department both refused the possible transfer because of Petitioner's "reputation." P.A. at 11a. The Liquor Commission did agree to accept Petitioner's transfer on the condition that his work grade status would depend upon his work performance. *Id.* Petitioner rejected this proposal. P.A. at 12a. Mr. Carson also arranged for Petitioner to be involved in the Visiting Nurse Program, a program in which a nurse visits the City employee's home during illnesses. *Id.* This effort failed since Petitioner was not at home during the nurses' visits. *Id.* Mr. Carson additionally enrolled Petitioner in the Troubled Employees Program for counseling; it was uncertain what effect this program had on Petitioner. *Id.*

In December of 1976, Alexander Oka wrote to Petitioner, calling his handling of a Liquor Commission audit "inadequate" and providing him with instructions on how to complete the work. P.A. at 6a. Around the same time, Mr. Hara memorialized his impression that Petitioner "had continuously been reminded that he was spending too much time pursuing personal business and grievance matters." *Id.*

On November 27, 1978, Samuel T. Hata, the Director of Finance, informed Petitioner that he was suspended for ten days for excessive use of sick leave, excessive use of work time to accomplish personal business, and malingering. P.A. at 6a-7a. More specifically, it was found that between 1973 and 1978 Petitioner took a total of 264-3/8 days of sick leave, and that, while on sick leave, Petitioner often conducted his own personal business ventures. P.A. at 12a-13a.

Less than one month after Petitioner completed his ten-day suspension, Mr. Carson issued a memorandum expressing disapproval of Petitioner's continued use of work time for personal business and warning that "[f]ailure to commit your entire working time to assigned work will be cause for disciplinary action." P.A. at 8a. Eight days later, Mr. Carson issued a similar memorandum disapproving of Petitioner's work habits and pointing out future consequences. *Id.* About one month later, Mr. Carson repeated his admonition and warning to Petitioner. P.A. at 8a-9a. And on January 30, 1979 and February 5, 1979, Petitioner was again reprimanded for lack of work performance. P.A. at 9a.

According to Mr. Carson, many of the telephone calls Petitioner received in the office during this time period related to his personal business dealings, and Petitioner's involvement in real property litigation was a major contributing factor in his taking of excessive sick leave. P.A. at 10a. Mr. Carson also recalled that Petitioner was warned at least a dozen times that his work was "inadequate." *Id.*

On April 18, 1979, Petitioner received an assignment to "review and evaluate the operational controls of the [Parks Department] Maintenance Support Services

Storeroom and submit recommendations," which assignment should have been completed in 200 hours. P.A. at 15a. Less than a month later, on May 11, 1979, Petitioner filed a discrimination complaint with the Equal Employment Opportunity Commission. *Id.*

After "completing" his Parks Department assignment on June 7, 1979, Petitioner submitted to Mr. Oka a 1-1/2 page report. *Id.* A day later, Mr. Oka expressed disappointment at the report, writing to Petitioner that "you have merely parroted a previous report and did no thinking on your part nor any analysis [sic] on your part [and] that you have spent so much time on this assignment and yet have very little to show for the effort." P.A. at 16a.

Thereafter, Mr. Oka recommended to Mr. Hata that Petitioner be dismissed for "insubordination" in general and for "refusal to do any appreciable work during the week ending Friday, July 6, 1979" in particular. P.A. at 16a-17a. Petitioner responded that he had been confused as to his job assignment and its due date, and commented on the "intolerable working conditions" and his perception that he was "continuously discriminated against and harassed." P.A. at 17a. Mr. Oka then wrote Petitioner a memorandum informing him that his work on the Parks Department project was "unsatisfactory" because of his "admission that [he] made no effort to go to the Parks storeroom to perform the inventory test" and his "working papers show[ed] that little work was done in the office." P.A. at 18a.

The trial court, quoting from the arbitrator's decision, summarized the situation as follows:

> Over [Petitioner's] 12-year employment period, the record shows enumerable attempts by [the City] to counsel, correct and rehabilitate [Petitioner] to acceptable levels of performance and [Petitioner] was afforded manifold opportunities along the way to reverse his downward spiraling work performance record. . . . Where [Mr. Carson] had "tried everything," but found "no hope," the ultimate discharge became inevitable, as most eloquently expressed in [Mr. Carson's] own words:
>
> "... We could see no change in attitude or conduct at all during the 10-year period that he was in, while I was there, in the Department of Finance, and in determining the extent of the punishment, we were at our wit's end to do anything. We just didn't know what else to do.
>
> "We had not been able to affect a resolvement [sic] of the situation no matter how much we'd tried, what we had done. It was the exact same thing as when we'd started, so in light of that, and not even having a glimmer of a hope to resolve the situation, the ultimate thing was to dismiss him, which we did."

P.A. at 20a-21a.

On July 18, 1979, Petitioner received a letter informing him that he was suspended without pay for ten days, with termination to follow. P.A. at 23a. The rea-

sons given for the suspension were "excessive use of sick leave," "inability to perform work assignments," "nonproduction of assigned work," and "attitude toward your job." P.A. at 23a-24a. Although Petitioner did not receive a pretermination hearing, Mr. Carson testified, and the trial court found credible, that "a pretermination hearing would not have changed or altered the suspension/termination decision." P.A. at 24a.

Petitioner subsequently attempted to grieve his termination, but his union refused to take the grievance to arbitration. P.A. at 27a. The Hawaii Public Employment Relations Board, however, agreed with Petitioner and ordered the union to refer the grievance to binding arbitration and to represent Petitioner at the hearing. P.A. at 28a. The arbitration proceeding spanned fifteen days, and the record developed in the proceeding included over 2,600 pages of testimony and 228 separate documentary exhibits. *Id.*

On January 14, 1987, the arbitrator, selected pursuant to the collective bargaining agreement, issued a decision in which he found that the City had legitimate reasons for dismissing Petitioner, the termination was not motivated by discrimination, and the City's action was not in retaliation for any of Petitioner's prior complaints and grievances. *Lum v. City & County of Honolulu*, 728 F. Supp. at 1453. Petitioner thereafter moved the Hawaii Labor Relations Board to vacate the arbitrator's decision. *Id.* The Board dismissed the motion, and the Circuit Court of the First Circuit, State of Hawaii, affirmed the dismissal. *Id.* In the meantime, the state court granted the City's motion to confirm the arbitration award "on the ground that the award had not been vacated or otherwise modified." *Id.*; *see* Haw. Rev. Stat. §

658-8 (the circuit court *shall* confirm an arbitration award unless it is "vacated, modified, or corrected"). Petitioner appealed both arbitration-related rulings to the Hawaii Supreme Court, which issued separate orders denying the appeals. *Lum v. City & County of Honolulu*, 728 F. Supp. at 1454.

B. Proceedings Below

The federal leg of Petitioner's meandering trek through the court system began in 1980, when, after he was terminated from his job as Internal Control Analyst II with the City, Petitioner filed a complaint in the United States District Court for the District of Hawaii in which he alleged violations of civil-rights laws, the due process clause, and the state civil service laws. Federal court jurisdiction was predicated upon 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 2000e-3. However, "the case was not moved forward because of pending arbitration proceedings" outlined above. *Lum v. City & County of Honolulu*, 690 F. Supp. at 915.

After the arbitrator issued his decision in the union grievance proceeding, the City filed a motion for summary judgment on the "entire claim on the basis that a prior arbitration decision precludes [the federal] action under principles of res judicata and estoppel." *Id.* The district court denied the City's motion, holding that "a state judgment which affirms an arbitration award would not operate to preclude a later Title VII action," *id.*, but "the arbitrator's findings should be given some weight at trial." *Id.* at 916.

The City moved for reconsideration of the district court's order on the strength of the Ninth Circuit's opinion in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th

Cir.), *cert. denied*, 493 U.S. 817 (1989), which held that an arbitrator's decision that is confirmed by a Hawaii state court is a "judicial proceeding" to be given "full faith and credit" and preclusive effect in a later federal proceeding. The court denied the City's motion, and, in the process, distinguished *Caldeira* by finding that, in the instant action, the arbitrator's decision was not given judicial consideration on the merits. *Lum v. City & County of Honolulu*, 728 F. Supp. at 1457. The court also noted that federal statutory and constitutional rights should not be resolved in an arbitral setting. *Id.* at 1459.

Upon receiving the district court's unfavorable legal ruling, the City sought permission to pursue an interlocutory appeal. The court granted the City's request, but the Ninth Circuit declined the invitation to rule on the issue. *See Lum v. City & County of Honolulu*, 732 F. Supp. at 1071.

The case eventually proceeded to trial before Judge Kay on July 19 and 20, 1990. On August 29, 1990, the court issued its "Decision, Findings of Fact, and Conclusions of Law" in which it held that: (1) Petitioner failed to sustain his burden to prove a retaliatory discharge under Title VII, and the City articulated legitimate non-retaliatory reasons for the termination; (2) Petitioner proved his due process rights were violated when he was not given a pretermination hearing and he should be awarded $8,000.00 for his emotional trauma, but he was not entitled to reinstatement since he "failed to prove that he would have been retained had full procedural due process been provided"; and (3) the City complied with section 76-46 of the Hawaii Revised Stat-

utes since Petitioner was given the requisite ten-day notice prior to termination. P.A. at 33a-40a.

Petitioner then filed a notice of appeal to the Ninth Circuit, and the City filed a notice of cross-appeal on the "full faith and credit" issue. The Ninth Circuit dismissed the City's cross-appeal on the ground that "there is no need to review denials of summary judgement after there has been a trial on the merits." *Lum v. City & County of Honolulu*, 963 F.2d at 1170. It affirmed the award of $8,000.00 for Petitioner's emotional distress occasioned by the violation of his procedural due process rights. *Id.* And it vacated as moot the district court's ruling that section 76-46 had not been violated, since "both the arbitrator and the district court concluded that [Petitioner] was terminated for good cause and that the result would not have been different if he had received pretermination notice and a hearing." *Id.* at 1171.

REASONS FOR DENYING THE WRIT

The instant petition should be denied because the issues raised therein were not preserved at the Ninth Circuit and deference should be paid to the district court's interpretation of the state civil service statute. Moreover, the district court's consideration of the evidence and its weighing of the credibility of witnesses should be respected. Indeed, Petitioner has failed to set forth any procedurally cognizable reason, let alone any "special and important reason," for this Court to grant his petition.

A. Petitioner's Title VII, Due Process, and Unfair Trial Claims Should Be Denied Review Because Petitioner Failed to Preserve His Objections Regarding Said Claims at the Ninth Circuit; Moreover, the Undisputed Factual Findings Support the District Court's Actions and Rulings on Said Claims

This Court has previously declared that failure to raise an issue in the court of appeals may preclude the raising of the issue for the first time on certiorari. *Demarest v. Manspeaker*, 498 U.S. 184, ___, 111 S. Ct. 599, 603 (1991); *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 551 n.3 (1990). It cannot be disputed that Petitioner did not challenge the fairness of the trial or the district court's rulings on his Title VII and due process claims. The scope of the Ninth Circuit's review, as specified by the court itself, was limited to the following issues:

> The plaintiff appeals the district court's finding that his termination was not in violation of Hawaii Revised Statutes ("HRS") § 76-46. The defendant cross-appeals the denial of its motion for summary judgement on the Title VII claims and the amount of damages awarded to the plaintiff for the violation of his due process rights resulting from the denial of a pretermination hearing.

Lum v. City & County of Honolulu, 963 F.2d at 1168. In fact, even Petitioner acknowledges in his petition that his Ninth Circuit appeal did not touch upon the issues he now seeks to raise. Petitioner recounted in his brief that he, "thru [sic] his new attorney, Evan Shirley, appealed on the

violation of HRS 76-46 only on Sept. 24, 1990." Petitioner's Brief at 6 (emphasis added).

Having failed to challenge the district court's rulings on his claims for relief under Title VII and the due process clause and having omitted a challenge to the fairness of his trial in the Ninth Circuit, Petitioner should not be allowed to seek review on certiorari. His petition therefore should be denied on the ground that it is procedurally infirm.

Moreover, even a cursory review of the district court's findings, conclusions, and decision tells of the court's thoroughness and fairness toward the litigants. With respect to Petitioner's Title VII claim, the district court detailed incident after incident, from 1972 to 1979, where Petitioner was found to be "inept," "ineffective," guilty of "insubordination," and abusive of sick-leave privileges, and his work was deemed "incomplete," "lacking," and "inadequate." *See* Statement of the Case, *supra*. At no time during the appellate process has Petitioner contested the accuracy of the district court's findings regarding his work performance, and he offers no meaningful challenge to them now. Clearly, then, the district court justifiably found with respect to the Title VII claim that:

> Plaintiff's extended career with the City and County was marred by ineffective work performance, abuse of sick leave privileges, and a poor work attitude. The event which constituted the "last straw" for the City and County concerned Lum's performance of an assignment at the Parks Storeroom. Plaintiff's work on the assignment was inadequate. When given an

> opportunity to complete the assignment properly Plaintiff failed to follow his supervisor's instructions. Accordingly, Plaintiff was given ten-days notice of his termination.
>
> After extensive hearings and an arbitration proceeding this case finally came to trial before this Court. Based on the overwhelming evidence presented in this case this Court finds that Plaintiff's retaliatory discharge claims are not supported. Even assuming Plaintiff made a prima facie case of retaliation, Defendant established legitimate non-retaliatory grounds for discharge which Plaintiff has failed to show were pretextual.

P.A. at 1a-2a. If this Court were to view all the trial evidence, it too would be left with the firm conviction that the district court's findings are supported by substantial, even overwhelming, evidence. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).[3]

On the due process issue, the district court ruled in favor of Petitioner, finding that the City failed to provide a pretermination hearing as required by law. P.A. at 37a. The court also determined that Petitioner sus-

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[3] Moreover, this Court has stated that it will not "ordinarily grant certiorari to review judgments based solely on questions of fact," *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 298 (1940), and that it will "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

tained emotional distress damages of $8,000.00, which were causally connected to the City's omission. P.A. at 39a. But the court concluded that Petitioner "failed to prove that he would have been retained had full procedural due process been provided. Accordingly, Mr. Lum is not entitled to reinstatement." P.A. at 38a.

The district court's decision denying Petitioner's prayer for reinstatement was well-grounded in law. It is well-nigh axiomatic that a claimant is not entitled to substantial relief unless he can establish that the actionable wrong caused his damages. Hence, this Court has recognized that relief beyond nominal damages will not be given unless the claimant can prove that his fate would have been altered if procedural due process had been followed.[4]

The court's denial of reinstatement is also factually sound. The court found credible Arlie Carson's trial testimony that he had read Petitioner's written explanation of the Parks Department assignment and that "a pretermination hearing would not have changed or altered the suspension/termination decision." P.A. at 24a. Petitioner has not challenged this factual finding, and he

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[4] *See Zinermon v. Burch*, 494 U.S. 113, 134 n.19 (1990) (A claimant admitted as a voluntary mental patient "might be entitled to actual damages, beyond the nominal damages awarded for a procedural due process violation unaccompanied by any actual injury, . . . if he can show . . . that if the proper procedure had been followed he would have remained at liberty and that he suffered harm by being confined[.]); *Carey v. Piphus*, 435 U.S. 247, 261 n.16 (1978) (Students cannot recover substantial damages for suspensions unless they show they still would have been suspended even if a proper hearing had been held.).

has not adduced any facts in rebuttal. Indeed, given the nearly seven-year history of poor work performance, the district court was justified in finding and concluding that a pretermination hearing would not have influenced the City's decision and Petitioner's fate. Therefore, the district court properly refused to reinstate Petitioner to his position.

Regarding Petitioner's claim that he was not given a fair trial, the City would make four observations. First, it is noteworthy that Petitioner's trial counsel did not object to the state arbitrator's and trial judge's fairness, competence, and impartiality. Second, appellate counsel did not complain to the Ninth Circuit about any unfairness in the arbitration and trial proceedings. Third, the district court issued specific findings rejecting Petitioner's averment that the union attorney did not properly represent him during the arbitration. The court found that the union attorney "adequately represented" Petitioner and that complaints of a strained attorney-client relationship were "overshadowed by the arbitrator's finding that the issues were bitterly contested." P.A. at 29a. These findings have not been and still are not contested. Fourth, Petitioner can point to no objective indicia of impartiality, such as would warrant the recusal or disqualification of the arbitrator and trial judge. Thus, Petitioner's claim of unfairness in the judicial process, like his other claims mentioned above, should not be considered by this Court.

B. Petitioner's Claim Based Upon Section 76-46 of the Hawaii Revised Statutes Should Be Denied Review Because the Task of Interpreting the State Statute Should Be Left to the District Court, and the Ninth Circuit Properly Held that, Even if the City Violated the Statute, Petitioner Is Not Entitled to Further Relief

With respect to Petitioner's claim for relief under section 76-46 of the Hawaii Revised Statutes, the trial court found that the City did give Petitioner the requisite ten-day pretermination notice. P.A. at 39a. It also concluded, from a plain reading of the statute, that "[t]he fact that for the ten days preceding his termination date Mr. Lum was suspended without pay is of no legal significance and does not affect the validity of the notice." P.A. at 39a-40a.

The district court's factual finding should be left intact since Petitioner has made no effort to show, nor can he show, that it was "clearly erroneous." *See United States v. United States Gypsum Co.*, 333 U.S. at 395. Petitioner's plea for review of the district court's construction and application of section 76-46 should be denied as prudentially improper since, normally, this Court "defer[s] to the construction of a state statute given it by the lower federal courts." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985). This Court exercises deference in part because of its belief "that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Id.* at 500.

Furthermore, the Ninth Circuit was correct in ruling that "[e]ven if the City violated § 76-46, it does not follow that Mr. Lum is entitled to additional relief." *Lum v. City & County of Honolulu*, 963 F.2d at 1171. The purposes of both the statute and the due process clause are identical—to furnish notice to the employee, to give him an opportunity to respond to the employer's charges, and to provide a hearing on the charges. *Bugbee v. Kimmich*, 42 Haw. 122, 124-25 (1957). That Petitioner already recovered $8,000.00 to compensate him for his emotional trauma arising out of the City's failure to protect his due process rights cannot be denied. Nor can it be denied that the district court rejected reinstatement as a remedy for the due process violation because of Petitioner's inability to prove that a pretermination hearing would have altered the City's decision.

Given the coinciding purposes of the statute and the due process clause, and the fact that Petitioner already received compensation for the violation of the latter, the Ninth Circuit was right in holding that Petitioner "is not entitled to additional relief under state law." *Lum v. City & County of Honolulu*, 963 F.2d at 1171.

Thus, review of the Ninth Circuit's decision on the section 76-46 claim should be denied because the district court's legal construction should be respected and the Ninth Circuit's opinion was proper.

CONCLUSION

For the foregoing reasons, Respondent City and County of Honolulu respectfully requests that the petition for writ of certiorari be denied.

Dated: Honolulu, Hawaii, November 10, 1992.

Ronald B. Mun
Counsel of Record
Corporation Counsel
Rodney Veary
Michael N. Tanoue
Deputies Corporation Counsel
City and County of Honolulu
Honolulu Hale
530 South King Street
Honolulu, Hawaii 96813
(808) 523-4628
Counsel for Respondent
City and County of Honolulu

APPENDIX

APPENDIX "A"
FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDGAR H.W. LUM, *Plaintiff-Appellant,*	No. 90-16452
v.	D.C. No. CV-80-00384-ACK
CITY AND COUNTY OF HONOLULU, *Defendant-Appellee.*	
EDGAR W.H. LUM, *Plaintiff-Appellee,*	No. 90-16732
v.	D.C. No. CV-80-00384-ACK
CITY AND COUNTY OF HONOLULU, *Defendant-Appellant.*	ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
February 12, 1992 — San Francisco, California

Filed March 17, 1992
Amended June 15, 1992

Before: Alfred T. Goodwin, Jerome Farris and
Cecil F. Poole, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Appeals/Employment Discrimination

The court of appeals affirmed in part and reversed in part a district judgment and dismissed in part an appeal from the judgment. The court held there is no need to review denials of summary judgment after there has been a trial on the merits.

Appellant Edgar Lum was dismissed from his job with appellee the City and County of Honolulu. Lum filed suit, alleging violations of Title VII, due process rights, and a state statute. The City claimed he was fired for good cause. The federal suit was stayed pending resolution of a grievance filed under an agreement between Lum's union and the City. Eventually, seven years after he was terminated, arbitration hearings were held, and it was determined that he was filed for misconduct, not for the reasons he alleged. A state labor relations board dismissed a motion to vacate. Lum appealed the dismissal to a state court. The court affirmed. Later the state court granted a motion to confirm the arbitration decision. The City moved for summary judgment. The motion was denied because appeals were still pending. It was renewed and denied a second time. A two-day bench trial was held in district court. The court determined that Lum was fired for legitimate cause. The court also held, however, that failure to provide him a pretermination hearing violated his due process rights; the court awarded damages and attorneys' fees. Finally, the court held the City had not violated the state statute. Lum appealed, and the City cross-appealed.

[1] The appropriate forum to review denial of a summary judgment motion is through interlocutory ap-

peal. There is no need to review denials of summary judgment after there has been a trial on the merits.

[2] The district court's award of damages to Lum was not extreme or outrageous on its face, and no reason was presented that the amount was not appropriately discounted. The court's findings were not clearly erroneous.

[3] Even if the City violated the state statute, it does not follow that Lum was entitled to additional relief. Both the arbitrator and the district court concluded he was terminated for good cause and that the result would not have been different if he had received pretermination notice and a hearing.

COUNSEL

Evan R. Shirley, Honolulu, Hawaii, for the plaintiff-appellant.

Rodney Veary, Deputy Corporation Counsel, City and County of Honolulu, Honolulu, Hawaii, for the defendant-appellee.

ORDER

In reviewing the case, our attention has been called to the cross appeal's contention that even after prevailing in a trial on the merits, the city was entitled to have an advisory opinion on the question whether the trial court had erred in denying the city's motion for summary judgment. We declined to review the trial court's ruling, citing *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987). Slip Op. 2669 at 2674.

The opinion filed March 17, 1992, is amended by adding a footnote signal at the end of the last paragraph

on page 2674, with the footnote to read as follows: In *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366 (9th Cir. 1990), reversing a judgment entered after a trial, we held that a proper reading of the law of Virginia would have excluded the parole evidence introduced at trial to vary the terms and conditions of an integrated written contract and summary judgment should have been given for the plaintiff. While the opinion did not cite *Locricchio*, the cases are not inconsistent. *Wilson Arlington* was about the parol evidence rule, and did not consider or discuss the reviewability *vel non* of the denial of summary judgment after trial on the merits. The opinion observed that had the trial court ruled correctly on the applicability of Virginia's parol evidence rule, and had excluded the parol evidence, no trial would have been necessary.

One other case deserves mention because its holding was explained in *Locricchio*, where we said "the majority rule appears to be that the denial is not properly reviewable on an appeal from the final judgment entered after trial." In a footnote, we said "*see Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975)" We went on to point out that because the challenged judgment in Hilton had been entered on a directed verdict, there was no jury verdict to overturn by examining the cross-appealability of the denial of summary judgment, a denial that could not have been reviewed earlier because it was not cross appealable until the entry of the final judgment upon the directed verdict. We adhere to the majority view that in the ordinary case where a motion for summary judgment has been denied because the trial court determined that issues of fact had to be tried, there is no useful purpose in reviewing the pretrial ruling on summary judgment after a plenary trial on the merits.

While we have not exhaustively searched for cases that appear to have decided, gratuitously or otherwise, questions that were not raised, we know they abound. Faced with these hazards to judicial navigation, we have frequently held that cases which stumble into decisions on questions neither raised nor discussed by the parties or by the trial court are not treated as authoritative on those unstated assumptions and nonlitigated points. See cases collected in *Sakamoto v. Duty Free Shoppers, LTD.*, 764 F.2d 1285, at 1288 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986).

With the opinion thus amended, the panel has voted unanimously to deny the petition for rehearing. Judges Farris and Poole have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

OPINION

GOODWIN, Circuit Judge:

In 1979 the defendant, City and County of Honolulu ("City"), fired the plaintiff from his position as an accountant. The plaintiff appeals the district court's finding that his termination was not in violation of Hawaii Revised Statute ("HRS") § 76-46. The defendant cross-appeals the denial of its motion for summary judgement on the Title VII claims and the amount of

damages awarded to the plaintiff for the violation of his due process rights resulting from the denial of a pretermination hearing.

The district court had federal question jurisdiction over Lum's Title VII, and due process claims under 28 U.S.C. §§ 1331, 1337, and 1343, and 42 U.S.C. § 2000e-(f)(3). The court had pendent jurisdiction over the state law claims. This court has jurisdiction pursuant to 28 U.S.C. § 1291. Notices of appeal were timely filed. Fed. R. App. P. 4(a).

I.

Mr. Lum had been an employee with the City of Honolulu for twelve years when, in 1979, he was dismissed from his job as an "Internal Control Analyst." Lum filed suit against the City alleging violations of Title VII of the Civil Rights Act of 1964, due process, and HRS § 76-46. Plaintiff claimed that his dismissal was based on race discrimination and was in retaliation for filing a complaint with the Equal Employment Opportunity Commission ("EEOC"). The City claimed that Lum was fired for ineffective work performance, abuse of sick leave, and a poor work attitude. Plaintiff also challenged the manner in which he was discharged.

The federal suit was stayed pending resolution of Lum's grievance under the collective bargaining agreement between Lum's union, the Hawaii Government Employees Association, and the City. The grievance process went through three stages at which point the union refused to represent Lum in arbitration. After a separate, lengthy battle, Lum prevailed in his fight with the union and the matter was slated for arbitration. In early 1986, almost seven years after the termination, arbitration

hearings were held and on January 27, 1987 a decision was filed concluding that the plaintiff had been fired for misconduct and that the discharge was not motivated out of racial discrimination or in retaliation for his filling a claim with the EEOC.

Lum filed a motion before the Hawaii Labor Relations Board to vacate the arbitration decision. The Board dismissed the motion because it lacked the authority to vacate an arbitration award. An arbitration decision can be challenged only in Hawaii Circuit Court pursuant to HRS Chapter 658. Rather than attacking the arbitration decision under Chapter 658, Lum appealed the Board's dismissal of his motion to the Hawaii Circuit Court. The Board's decision to dismiss his motion was affirmed by both the Circuit Court and the Hawaii Supreme Court. Meanwhile, the City moved in Circuit Court to "confirm" the arbitration award pursuant to HRS § 658-8. The motion was granted on the grounds that the arbitration award had not been vacated or otherwise modified. Lum appealed this grant to the Hawaii Supreme Court which again ruled against him.

On June 3, 1988 the City moved for summary judgement in the present action on the Title VII claim arguing that the arbitrator's decision should be given preclusive effect. The motion was denied, in part, because appeals were still pending in state court. *See Lum v. City and County of Honolulu*, 690 F.Supp. 914 (D.Haw. 1988) (Lum I). The Motion was renewed on March 23, 1989 after all state appeals had become final. For a second time it was denied. *See Lum v. City and County of Honolulu*, 728 F.Supp. 1452 (D.Haw. 1989) *(Lum II)*. The district court granted the City's motion to certify the denial of summary judgement for interlocutory appeal

pursuant to 28 U.S.C. § 1292(b). We did not permit the appeal to be taken.

After a two day bench trial, the district court ruled for the City on the Title VII claims, finding that the City had legitimate cause to fire Mr. Lum. The court held, however, that the City's failure to afford Mr. Lum a pretermination hearing violated his due process rights and awarded the plaintiff actual damages in the amount of $8,000 and attorneys' fees with respect to that issue. Finally, the court ruled that the City had not violated HRS § 76-46.

II.

On cross-appeal the City asks us to reverse the district court's denial of its motion for summary judgement on the Title VII claims. The City argues that the district court's decisions are inconsistent with our opinion in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, 493 U.S. 817 (1989). While the City was denied summary judgement, it was awarded judgement on the Title VII claim after a trial on the merits.

In *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1858-59 (9th Cir. 1987), we refused to review the denial of a summary judgement motion by a party who had suffered an adverse judgement on the merits. "We hold, therefore, that the denial of a motion for summary judgement is not reviewable on an appeal from a final judgment entered after a full trial on the merits." *Id.*

Locricchio is somewhat at odds with our earlier opinion in *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975). Mumaw was denied summary judgement but received a directed verdict. Hilton appealed from the

directed verdict while Mumaw cross-appealed from the denial of summary judgement. Without specifically addressing the issue of reviewability, we entertained the cross-appeal. "[A]s to issues upon which we reverse the directed verdict, we affirm the denial of summary judgment. As to issues upon which we affirm the directed verdict, we dismiss the cross appeal as moot." *Id.* We reasoned in *Locricchio* that we were not bound by *Hilton* because the decision did not address the issue of reviewability.

[1] The appropriate forum to review the denial of a summary judgement motion is through interlocutory appeal under 28 U.S.C. § 1292(b). The defendant's efforts to seek interlocutory appeal were unsuccessful. We follow the teaching of *Locricchio* and hold that there is no need to review denials of summary judgement after there has been a trial on the merits. Such a review is a pointless academic exercise. The City's cross-appeal of the denial of the summary judgement motion is dismissed.[1]

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[1] In *Wilson Arlington Co. v. Prudential Ins Co.*, 912 F.2d 366 (9th Cir. 1990), reversing a judgment entered after a trial, we held that a proper reading of the law of Virginia would have excluded the parole evidence introduced at trial to vary the terms and conditions of an integrated written contract and summary judgment should have been given for the plaintiff. While the opinion did not cite *Locricchio*, the cases are not inconsistent. *Wilson Arlington* was about the parol evidence rule, and did not consider or discuss the reviewability *vel non* of the denial of summary judgment after trial on the merits. The opinion observed that had the trial court ruled correctly on the applicability of Virginia's parol evidence rule, and had excluded the parol evidence, no trial would have been necessary.

One other case deserves mention because its holding was explained in *Locricchio*, where we said "the majority rule appears to

III.

The district court awarded Lum partial summary judgement on the due process claim. The court found that Lum had a property interest in continued employment and was entitled to due process, including adequate notice of the charges and an opportunity to be heard, prior to termination. The court held that the City violated these rights when it terminated the plaintiff without a pretermination hearing. The City does appeal the award of $8,000 in actual damages.

The computation of damages is a finding of fact that is reviewed under the clearly erroneous standard.

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be that the denial is not properly reviewable on an appeal from the final judgment entered after trial." In a footnote, we said "*see Hilton v. Mumaw*, 552 F.2d 588, 603 (9th Cir. 1975)" We went on to point out that because the challenged judgment in *Hilton* had been entered on a directed verdict, there was no jury verdict to overturn by examining the cross-appealability of the denial of summary judgment, a denial that could not have been reviewed earlier because it was not cross appealable until the entry of the final judgment upon the directed verdict. We adhere to the majority view that in the ordinary case where a motion for summary judgment has been denied because the trial court determined that issues of fact had to be tried, there is no useful purpose in reviewing the pretrial ruling on summary judgment after a plenary trial on the merits.

While we have not exhaustively searched for cases that appear to have decided, gratuitously or otherwise, questions that were not raised, we know they abound. Faced with these hazards to judicial navigation, we have frequently held that cases which stumble into decisions on questions neither raised nor discussed by the parties or by the trial court are not treated as authoritative on those unstated assumptions and nonlitigated points. See cases collected in *Sakamoto v. Duty Free Shoppers, LTD.*, 764 F.2d 1285, at 1288 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986).

Galindo v. Stoody Co., 793 F.2d 1502, 1516 (9th Cir. 1986). The district court concluded that "[a]lthough the causal link between the City and County's actions is questionable this court concludes that there was sufficient probative evidence of some embarrassment and humiliation by Mr. Lum caused by the denial of a pretermination hearing to justify an award of $8,000."

[2] On appeal, the City challenges the evidence but fails to establish that the district court ignored relevant factors in calculating the award. The award is not extreme or outrageous on its face. No reason is presented to suggest that the amount of damages was not appropriately discounted. We hold that the district court's findings were not clearly erroneous and affirm the award.

IV.

Hawaii law mandates that certain steps be taken before an employee in Mr. Lum's position can be fired. The relevant statute provides:

> No dismissal or demotion of any regular employee shall be effective for any purpose unless at least ten days before the effective date thereof the appointing authority shall have given to the employee a written statement setting forth the specific reasons upon which the dismissal or demotion is based.

HRS § 76-46. The corresponding Civil Service Rule states:

> When an employee is dismissed or demoted, a written notice setting forth the specific reasons for the dismissal or demo-

> tion shall be given to the employee at least ten calendar days before the effective date of such dismissal or demotion and a copy thereof shall be filed with the Director.

Civil Service Rule 10.3(c).

Mr. Lum was handed a letter stating that he was being suspended for ten days without pay at the end of which period he would be discharged. The district court held the City's actions did not violate § 76-46 and that the ten day suspension without pay was "of no legal significance." A district court's construction of state law is reviewed de novo. *Sax v. World Wide Press, Inc.*, 809 F.2d 610, 613 (9th Cir. 1987).

The statutory language and the state case law do not provide a clear indication whether the Hawaii Supreme Court would find that a ten day suspension without pay prior to termination would violate § 76-46. Courts in other jurisdiction have held that similar practices violate federal due process. *See Thurston v. Dekle*, 531 F.2d 1264, 1272 (5th Cir. 1976), *vacated on other grounds*, 438 U.S. 901 (1978), *relevant portions reinstated* 578 F.2d 1167 (5th Cir. 1978); *Gniotek v. City of Philadelphia*, 808 F.2d 241, 243-44 (3rd Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987).

[3] Even if the City violated § 76-46, it does not follow that Mr. Lum is entitled to additional relief. He was awarded $8,000 for essentially the same claim brought as a federal action. In holding that the termination of a teacher violated HRS § 297-12, a provision similar to § 76-46, the Hawaii Supreme Court addressed the issue of remedy.

> With respect to plaintiff's request for a declaration that Shorba is entitled to reinstatement to his former position with back pay, we hold that Shorba is not entitled to such relief at this time, that he remains on suspension without pay pending the hearing; and that in the event that the hearing results in his favor, he will then be entitled to resume his former position with back pay.

Shorba v. Shiro Amioka, 54 Haw. 43, 501 P.2d 807, 813 (1972). Lum has received two extensive post termination hearings and both the arbitrator and the district court concluded that he was terminated for good cause and that the result would not have been different if he had received pretermination notice and a hearing. On these facts we hold that the plaintiff is not entitled to additional relief under state law.

Because the plaintiff is not entitled to further relief, we need not decide whether the City's actions violated § 76-46. The district court's finding that there had been no violation of § 76-46 is vacated, as it was not necessary to the decision of the case. We express no opinion on that issue because it is moot.

DISMISSED IN PART, AFFIRMED IN PART, AND VACATED IN PART.